

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of
Michael R. Schramm

Serial No.: 10/092,878

Filed: March 6, 2002

For: Spill-Proof Coloring Container

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Group Art Unit: 1734

Examiner: Brenda A.
Lamb

APPEAL BRIEF

Commissioner of Patents
Alexandria, VA 22313-1450

This correspondence is being electronically transmitted to the patent office via an EFS-Web transmission on October 13, 2007.
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Dear Sir:

Pursuant to 37 CFR § 41.37, appellant submits this Appeal Brief to the Board of Patent Appeals and Interferences in support of his appeal from the decision dated December 6, 2006 of the Examiner rejecting claims 21-45 and 47-54 of the captioned application and in response to the official office action dated December 6, 2006. Appellant submits that the Examiner erred in rejecting the claims, and respectfully requests reversal of the rejection.

Appellant notes that this appeal brief was previously modified from the appeal brief submitted on April 18, 2007 in response to a "Notification of Non-Compliant Appeal Brief" mailed May 29, 2007, to identify that claims 1-20 were cancelled.

Appellant notes that this appeal brief is currently modified from the appeal brief submitted on June 7, 2007 in response to a "Notification of Non-Compliant Appeal Brief" mailed September 19, 2007, to eliminate amendments that were presented in a March 3, 2007 office action response (and that included typographical errors pointed out by the examiner) but that were not entered by the examiner. Appellant represents that this current appeal brief complies with all parts of 37 CFR § 41.37(c)(1). Appellant notes that included with appellant's appeal brief filed on April 18, 2007, was an appeal brief filing fee required under 37 CFR § 41.20(b)(2). Appellant respectfully requests that this previously transmitted appeal brief filing fee be applied against appellant's current appeal brief.

(c)(1)(i) Real Party in Interest

The real party in interest is Michael R. Schramm.

(c)(1)(ii) Related Appeals and Interferences

Appellant is unaware of any pending appeal or interference which affects this appeal.

(c)(1)(iii) Status of Claims

Claims 1-20 have been cancelled. Claims 21-45 and 47-54 are finally rejected and are pending on appeal. Claim 46 has been allowed.

(c)(1)(iv) Status of Amendments

The appealed claims have been finally rejected. In response to the final rejection, on March 3, 2007 amendments believe to correct noted typographical errors pointed out by the examiner and otherwise better prepare the application for appeal were filed for claims 22, 34, 41, 48-50, and 52-54. An advisory action, mailed on March 30, 2007 and in response to the final rejection response, indicated that the amendments to the claims would not be entered. Accordingly, the amendments presented in the March 3, response have been removed from this appeal brief.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 21

The subject matter of claim 21 is a combination of a container, a work piece, a utensil, and a colorant, with the container having an open funnel, and with the work piece, utensil, and colorant at least partially removably contained within the container, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 28

The subject matter of claim 28 is a combination of a container and a work piece removably contained within the container, with the container having an open funnel, and with the work piece being one of a substantially egg shaped work piece, an edible work piece, a substantially egg shaped edible work piece, and an egg as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in

the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 34

The subject matter of claim 34 is a combination of a container, non-fluid edible matter (an egg), and a non edible utensil, with the container having an open funnel, and with the non-fluid edible matter and non edible utensil at least partially removably contained within the container, and with the utensil being one of a brush, a spoon, a device having a handle portion and a non-handle portion, a pair of tongs, a straw, a wire egg dipper, and a device for use in dipping eggs having a handle portion and an egg retention portion, and a device having a handle portion and an open loop portion as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50 and a brush utensil 60.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 40

The subject matter of claim 40 is a combination of a container and colorant contained within the container, with the container having an open funnel, and with the colorant being one of a colorant tablet, a discrete article of colorant, and a colorant pill defining a colorant powder concentrate enclosed within a liquid soluble container as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 47

The subject matter of claim 47 is a combination of a container, edible matter, and a utensil, with the container having an open non-annular funnel, and with the edible matter and the utensil at least partially removably contained within the container, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 49

The subject matter of claim 49 is a combination of a container, an edible article, and a non edible utensil, with the container having an open funnel, and with the edible article and the utensil at least partially removably contained within the container, and with the edible article and the utensil being two discrete unconnected objects such that the utensil is operable to manipulate the edible article, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 50

The subject matter of claim 50 is a combination of a container, non-liquid edible matter (an egg), and a utensil, with the container having an open funnel, and with the non-liquid edible matter and the utensil at least partially removably contained within the container, and with the utensil having a substantially elongated handle portion and an open loop portion, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 52

The subject matter of claim 52 is a combination of a container, a colorable work piece, and a utensil, with the container having an open funnel that permits the passage of the work piece and a well, and with the work piece and the utensil at least partially removably contained within the container, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 53

The subject matter of claim 53 is a combination of a container and an article, with the container having an open funnel that permits the passage of the article and a well adapted to receive the article,

and with the article at least partially removably contained within the container, and with the article being one of a substantially egg shaped article, an edible article and a substantially egg shaped edible article, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 54

The subject matter of claim 54 is a combination of a container and an article, with the container being resistant to spills of liquid and having an open funnel that permits the passage of the article and a well adapted to receive the article, and with the article at least partially removably contained within the container, and with the article being one of a substantially egg shaped article, an edible article and a substantially egg shaped edible article, as described in the specification on page 3 line 5 through 9 and page 3 line 26 through page 4 line 11 (ref US 20020129763, para [0005], lines 1 through 24), and as shown in the drawings in sheets 1 through 4 which depict container 10 having a funnel 34 and at least partially removably containing egg work piece 50, brush utensil 60, and dye tablet colorant 70.

(c)(1)(vi) Grounds of Rejection to be Reviewed on Appeal

Ground 1: Claims 22-24, 34-39, 40-45, and 47-51 are rejected under 35 USC § 112 first paragraph – Written description.

Ground 2: Claims 21-22, 24-28, 30-34, 36-45, and 47-51 are rejected under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Martindale ‘797, Price ‘678, and Japan 11-227388.

Ground 3: Claims 23, 29, and 35 are rejected under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Price ‘678, Martindale ‘797, and Japan 11-227388 in further view of Lintvedt ‘294.

Ground 4: Claims 47 and 48 are rejected under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Price ‘678, Martindale ‘797, and Japan 11-227388 and if necessary, McShane ‘687.

Ground 5: Claims 34, 36, 38, 39 and 47-49 are rejected under 35 USC § 102(b) as being anticipated by Price 3,840,678.

Ground 6: Claim 35 is rejected under 35 USC § 103(a) as being unpatentable over Price ‘678 in view of Lintvedt ‘294.

Ground 7: Claim 35 is rejected under 35 USC § 103(a) as being unpatentable over Price '678 in view of Schramm '046.

Ground 8: Claims 40-42 and 44-45 are rejected under 35 USC § 102(b) as being anticipated by McCombs 1,254,714.

Ground 9: Claim 43 is rejected under 35 USC § 103(a) as being unpatentable over McCombs '714 in view of Schramm '046.

Ground 10: Claims 40 and 43-45 are rejected under 35 USC § 102(e) as being anticipated by Martindale 5,758,797.

Ground 11: Claim 42 is rejected under 35 USC § 103(a) as being unpatentable over Martindale '797.

Ground 12: Claim 41 is rejected under 35 USC § 103(a) as being unpatentable over Martindale '797 in view of Lintvedt '294.

Ground 13: Claims 52-54 are rejected under 35 USC § 103(a) as being unpatentable over Price '678 in view of Meth '599.

(c)(1)(vii) Argument 1, Claims 22-24, 34-39, 40-45, and 47-51 were erroneously rejected under 35 USC § 112 first paragraph – Written description:

The examiner has rejected claims 22-24, 34-45, and 47-51 under 35 USC § 112 first paragraph. Appellant respectfully traverses the examiner's rejection based on the arguments provided below. Accordingly, appellant respectfully requests that the examiner withdraw the rejection.

Non-annular Funnel: The examiner contends that appellant's specification as originally filed failed to teach "a container having a non-annular funnel connected to an opening in a wall of the container wherein the funnel axis is defined as running substantially from the center of the opening in the wall to substantially the center of an opening in the funnel located within the container, and wherein a cross-sectional shape of the funnel in a position substantially normal to the funnel axis defines a cross-sectional shape having a first breadth dimension and a second breadth dimension and wherein the first breadth dimension is greater than the second breadth dimension". With respect to the non-annular cross-section shape, appellant provides the following explanation: In order to maximize the spill resistivity of appellant's container, the anticipated potential gap between the intended work piece and sidewalls of appellant's funnel were minimized. In other words, appellant's funnel was sized and shaped for an egg (i.e. the intended work piece which has a generally elliptical shaped cross-

section) to pass through appellant's funnel without excessive gaps or openings through which jostled or splashed liquid could spill. Accordingly, appellant's funnel forms the shape of an "extruded ellipse". Appellant notes that an ellipse, by definition, includes a first breadth dimension that is greater than a second breadth dimension. Furthermore, the well of appellant's container, forms a well having a corresponding generally elliptical cross-sectional shape. This fact is rendered clear by reference for instance to drawing figure 2. In figure 2, an exploded isometric view of appellant's container, the container is shown as having a generally conical shape. Accordingly and in particular, the upper edge of lid 30 is shown as a circle (refer to the upper edge of lid 30 nearest the arrowhead of feature callout 30). Note that this circular edge is in distinct contrast to the elliptical upper edge of funnel opening 36. Were it not so and funnel 34 were circular in cross-sectional shape rather than elliptical in cross-sectional shape, then the distance between upper opening edge 36 and the upper outer corner of lid 30 would need to be constant regardless of the clocking or angular orientation of where a measurement is taken. But inasmuch as funnel 34 is elliptical in cross-sectional shape, the distance between funnel upper opening 36 and the upper outer edge of lid 30 is the least when measured at an angular orientation in line with tab 31 (because the major diameter of funnel 34 cross-section is in line with tab 31), and the distance between funnel upper opening 36 and the upper outer edge of lid 30 is the greatest when measured at an angular orientation 90 degrees from tab 31 (because the minor diameter of funnel 34 cross-section is 90 degrees from tab 31). It can also be seen in figure 2 (and figure 1) and confirmed in figures 3, 4, and 5, that the edge of funnel lower opening 38 defines an ellipse that is angularly in line with the elliptical edge of funnel upper opening 36, but is of smaller and offset major and minor diameters. Having thus pointed out that the funnel of applicant's container is elliptical in cross-sectional shape, appellant respectfully points out that "elliptical" satisfies the definition of "non-annular".

By way of clarification, appellant notes that the axis of appellant's funnel is merely a theoretical line that passes through the center of elliptical opening 36 and elliptical opening 38. Thus while the axis exists, it is not shown in the drawing figures. The purpose of including the definition of the axis was to define the orientation of a cross-sectional cut of funnel 34 so as to ensure that the resultant cross-sectional cut was elliptical. For instance, if funnel 34 were to have a cross-sectional cut taken vertically, then the resultant cross-section would not result in an ellipse, but rather it would result

in the straight lines shown nearest the arrowhead of feature callout 34 in figures 3, 4, and 5. Thus appellant respectfully represents that appellant has established that appellant's original disclosure does in fact support "a container having a non-annular funnel connected to an opening in a wall of the container wherein the funnel axis is defined as running substantially from the center of the opening in the wall to substantially the center of an opening in the funnel located within the container, and wherein a cross-sectional shape of the funnel in a position substantially normal to the funnel axis defines a cross-sectional shape having a first breadth dimension and a second breadth dimension and wherein the first breadth dimension is greater than the second breadth dimension".

Claims Breadth: The examiner further contends that "the term "non-annular" is so broad that it reads on a variety of configurations other than one having an annular or circular cross-section and these configurations would include those that are not disclosed by the originally filed specification such as a funnel having a square-shaped cross-section". Appellant agrees with the examiner's contention. However, appellant respectfully suggests that the examiner has applied the wrong test and that the examiner's argument is not supported in law. Appellant respectfully suggests that 35 USC § 112 does not require of an applicant to described every conceivable configuration that an applicant's claim language may cover, rather 35 USC § 112 requires that an applicant described a configuration that supports applicant's claim language. Applying this argument to appellant's application, it is of no concern that appellant's disclosure did not describe a funnel having rectangular cross-section (i.e. a configuration that "non-annular" reads on), as long as appellant's application described at least one "non-annular" configuration (i.e. appellant's funnel of elliptical cross-section) that supports the claim language. Furthermore, appellant respectfully points out that the functional geometric shape of the funnel of several patented containers has been held to be allowable subject matter. See for instance claim 1 of 5,246,046, claims 1 and 10 of 5,495,876, and claims 1 and 10 of RE36,131. More specifically, see claim 36 of recently issued US reissued patent RE39,443 which specifically recites a "non-cylindrical/non-conical funnel".

Breadth vs. Cord: The examiner further argues that "the recitation that a first breadth dimension is greater than the second breadth dimension does not limit the shape of the funnel to an ellipse since the first breadth dimension and the second breadth dimension as claimed are not required to pass through the funnel axis and can in fact read on a figure with a circular cross-section since a

cord which defines a given breadth dimension that does not pass through the funnel axis can have different lengths”. While appellant agrees with the examiner that “the recitation that a first breadth dimension is greater than the second breadth dimension does not limit the shape of the funnel to an ellipse”, appellant respectfully disagrees with the examiner’s assertion that the noted configuration “can in fact read on a figure with a circular cross-section”. Appellant respectfully suggests that the examiner has confused the definition of a cord and the definition of the word “breadth”. Webster’s dictionary defines the word “cord” as “a line segment joining to points on a curve”, whereas Webster’s dictionary defines the word “breadth” as “the measure or dimension from side to side”. Thus a breadth dimension is the measurement of the full width of a geometric entity such as a circle or an ellipse, whereas only in the case of cord passing through the axis of a circle or an ellipse is a cord coincident with a breadth dimension. Accordingly, appellant respectfully points out that while appellant’s claims may perhaps not be limited to a funnel of an elliptical cross-section, appellant’s claims expressly exclude a funnel of a circular cross-section. Had appellant used the word “cord” in place of the word “breadth” as the examiner seems to suggest, the same argument would not apply.

Utensil having a handle portion and a non-handle portion: The examiner argues that “the originally filed specification fails to teach or suggest a utensil having a handle portion and a non-handle portion”. Appellant respectfully traverses the examiner’s assertion. Appellant points out that brush utensil 60 (see for instance drawing figure 3) clearly discloses a utensil having a handle portion (i.e. the depicted handle) and a non-handle portion (i.e. the depicted bristles). Appellant represents that it would be inconceivable that a person having ordinary skill in the art would not be able to distinguish appellant’s disclosed utensil handle portion from appellant’s disclosed utensil non-handle portion.

Unconnected objects: The examiner argues that “the originally filed specification fails to teach or suggest the edible article and the utensil are “unconnected” objects”. Appellant respectfully traverses the examiner’s assertion. Appellant points out that brush utensil 60 and egg work piece 50 were clearly depicted as two distinct, separate, and unconnected objects (see drawing figure 3).

(c)(1)(vii) Argument 2, Claims 21-22, 24-28, 30-34, 36-45, and 47-51 were erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claims 21-22, 24-28, 30-34, 36-45, and 47-51 under 35 USC § 103(a) as being unpatentable over the combination of Law '239 in view of Schramm '046, Hunter (GB) 1,428,356, Martindale '797, Price '678, and Japan 11-227388. Appellant respectfully traverses the Examiner's rejection on the basis that appellant's invention in the appended modified claims is substantially different than the cited prior art patents. Appellant notes that while Schramm '046, Hunter (GB) 1,428,356, Martindale '797, Price '678, and Japan 11-227388 are directed toward spill resistant containers, Law '239 is directed towards a conventional egg crate type egg coloring container. While Law '239 does recognize spilling as a problem, Law '239 attempts to solve the spilling problem by providing an egg crate structure having multiple egg containing compartments that eliminate the need to move separate bowls to "create work room". This in spite of art such as Hunter (GB) 1,428,356 and Price '678 being available to Law. Law's solution is of course inadequate as it only minimally reduces spills and leaves the egg crate type container extremely susceptible to spilling when tipped. Law '239 does not provide for an egg container that includes a funnel or that prevents spillage regardless of the orientation of the container. Appellant respectfully suggests that there is no obvious motivation to combine the cited references. On the contrary, appellant's current invention and the cited prior art are far removed. The invention of a container that provides ready access to a removable egg and yet provides for the resistance to spillage of liquid contents of the container when the container is oriented in any position is distinctly nonobvious. Appellant respectfully suggests that having a funnel member of a size and shape that will allow for the passage of an egg is counterintuitive. Appellant points to the previously cited allowance of US patent RE39,443 (SN 09/867,320) as substantiation of a container having a "non-cylindrical/non-conical funnel" as being patentable. It is the combination of applicant's funnel, funnel geometry, container geometry, container contents, and container spill resistance regardless of container orientation that combine to provide the claimed function and thus contribute to patentability of appellant's invention. Based on the novel and nonobvious nature of appellant's invention, appellant respectfully requests that the rejection be withdrawn.

The examiner has stated that, "With respect to claim 25, 31, 37, and 43, Schramm, Japan '388 and Martindale each teach constructing the container from a plastic material. The method of forming the container from plastic in the form of a sheet is not germane to issue of the patentability of the

device/container itself”. Appellant respectfully traverses the examiner’s rejection. Appellant notes that appellant did not claim the “method” of forming the container but rather the composition or construction of the container (i.e. what it is made of). Appellant represents that the container being constructed of plastic sheet formed a portion of appellant’s disclosure and is considered by the appellant to be part of appellant’s invention. Appellant does not dispute that other patents teach a container formed of plastic sheet. On the contrary, appellant readily acknowledges that for instance claims 8 and 28 of Schramm ‘138 read in part, “... wherein said container defines a container consisting of formed plastic sheet”. Such recitation does not stand as a reference against patentability, but rather as a clear precedent that such claim language is indeed germane to patentability and that such claim language is indeed patentable. However, appellant further respectfully points out that the claims in question, claims 25, 31, 37, and 43, are all dependent claims and that as such the claims must be examined in combination with all of the limitations found in the claims from which they depend.

The examiner has stated that, “With respect to claims 24, 30, 36, and 42, Schramm, Japan ‘388 and Martindale each show in their figures that the container is comprised of a first and a second member. Schramm, Japan ‘388 and Martindale each show the container having a first member which is detachably engagable to the second member which is obviously at least partially sealingly engagable with the second member in order to prevent leakage of the contents of the container”. Appellant does not dispute the noted teachings of the cited patents. However, appellant again respectfully points out that the claims in question, claims 24, 30, 36, and 42, are all dependent claims and that as such the claims must be examined in combination with all of the limitations found in the claims from which they depend. When consider in combination with the claims from which they depend, appellant suggests that the subject dependent claims are allowable.

The examiner has stated that, “With respect to claims 26, 32, 38, and 44, ... the wall of the container below the funnel and including the funnel of the Schramm, Japan ‘388 and Martindale container can serve as a flow channel”. Appellant respectfully traverses the examiner’s assertion. Appellant’s flow channel is far removed from the cited teachings. The American Heritage dictionary defines a channel as, “trench, furrow, or groove”. Clearly the flow channel (i.e. a trench, furrow, or groove) taught in appellant’s application is not found or taught in the cited prior art. Furthermore, appellant has claimed the funnel distinct from a wall and applicant has limited the flow channel to

being formed within a wall. In contrast, the examiner is suggesting that “the wall of the container below the funnel and including the funnel of the Schramm, Japan ‘388 and Martindale container can serve as a flow channel”. If the entire wall (and even funnel) is to be considered the flow channel, then the so-called flow channel of the cited art cannot be formed within a wall. Thus appellant suggests that appellant’s flow channel defines over the all cited art.

(c)(1)(vii) Argument 3, Claims 23, 29, and 35 were erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claims 23, 29, and 35 under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Price ‘678, Martindale ‘797, and Japan 11-227388 in further view of Lintvedt ‘294. Inasmuch as claims 23, 29, and 35 depend from independent claims that are believed to be novel and nonobvious, and inasmuch as claims 23, 29, and 35 inherently include all the limitations of the independent claims from which they depend, appellant respectfully requests that the rejection be withdrawn.

(c)(1)(vii) Argument 4, Claims 47 and 48 were erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claims 47 and 48 under 35 USC § 103(a) as being unpatentable over the combination of Law ‘239 in view of Schramm ‘046, Hunter (GB) 1,428,356, Price ‘678, Martindale ‘797, and Japan 11-227388 and if necessary, McShane ‘687. Appellant respectfully traverses the examiner’s rejection. As detailed earlier in this appeal brief, a container having a “non-cylindrical/non-conical funnel” (i.e. a non-annular funnel) has been held to be allowable by virtue of several patents including US RE39,443. Appellant notes that it is the non-annular shape of the funnel, and not the overall shape of the container (such as McShane) that appellant is claiming. Accordingly, appellant respectfully requests that the rejection be withdrawn.

(c)(1)(vii) Argument 5, Claims 34, 36, 38, 39 and 47-49 were erroneously rejected under 35 USC § 102(b) – Anticipation:

The Examiner has rejected claims 34, 36, 38, 39 and 47-49 under 35 USC § 102(b) as being anticipated by Price 3,840,678. Appellant respectfully traverses the examiner's rejection based on the reasons provided below. Further, appellant notes that the examiner states that "Price teaches a kit comprising ... an edible article or edible commodity/object, ... and a non-edible utensil or spoon 32 removably contained within the container wherein the article and the non-edible utensil are unconnected as shown in Figure 2 such that the recited utensil can manipulate the article". Appellant respectfully points out that neither figure 2 or any other figure of Price shows an edible article and a non-edible (or edible) utensil. The spoon 32 which includes an edible handle is a single (not unconnected) utensil. Further, absent the utensil itself, Price does not teach an edible article. Thus in Price there is no "edible article and a non-edible (or edible) utensil". Appellant also refers the board to appellant's comments with respect to the flow channel and separate container portions. Accordingly, based on the teaching of Price noted by the appellant, and based of the reasons provided below, appellant respectfully suggests that appellant's claimed invention is not anticipated by Price and appellant respectfully requests that the examiner's rejection be withdrawn.

With respect to claim 34, appellant noted in his immediately previous office action response, that appellant amended claim 34 to add the additional limitation of "non-fluid edible matter removably contained within said container". Appellant respectfully points out that the examiner has repeated her rejection without addressing the new limitations that appellant previously added. Accordingly, appellant believes claim 34 and all claims depending therefrom define over and are not anticipated by Price '678.

With respect to claim 47, appellant respectfully traverses the examiners argument that Price '678 anticipates claim 47. Claim 47 includes the limitation "non-annular funnel". It is the "non-annular funnel" that provides for a greater container volumetric utilization. Price '678 teaches and claims a conical funnel (see col 2, line 2 and fig 2). A conical funnel, being a subset of an annular funnel, thus does not teach, disclose, or anticipate appellant's "non-annular" funnel.

With respect to claim 49, appellant noted in his immediately previous office action response, that appellant amended claim 49 to add the additional limitation of "wherein said edible article and said non-edible utensil define two discreet unconnected objects such that said non-edible utensil is operable to manipulate said edible article". Appellant respectfully points out that Price '678 merely

discloses a singular utensil that is inserted and withdrawn from a container, whereas appellants' invention discloses a non-edible utensil that is separate from and used in combination with an edible article. Accordingly, appellant believes claim 49 as defines over and is not anticipated by Price '678. Inasmuch as claims 34 and 49 have been amended to define over Price '678 and inasmuch as claim 47 is not anticipated by Price '678, appellant respectfully requests that the rejection be withdrawn.

(c)(1)(vii) Argument 6, Claim 35 was erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claim 35 under 35 USC § 103(a) as being unpatentable over Price '678 in view of Lintvedt '294. Inasmuch as claim 35 depends from independent claim 34 which applicant believes to be novel and nonobvious, and inasmuch as claim 35 inherently includes all the limitations of independent claim 34 from which claim 35 depends, appellant respectfully requests that the rejection be withdrawn.

(c)(1)(vii) Argument 7, Claim 35 was erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claim 35 under 35 USC § 103(a) as being unpatentable over Price '678 in view of Schramm '046. Inasmuch as claim 35 depends from independent claim 34 which appellant believes to be novel and nonobvious, and inasmuch as claim 35 inherently includes all the limitations of independent claim 34 from which claim 35 depends, appellant respectfully requests that the rejection be withdrawn. Further appellant directs the board's attention to appellant's previous arguments (in this appeal) with respect to appellant's container being constructed of (i.e. not a method claim) formed sheet (see also claims 8 and 28 of US patent 6,386,138).

(c)(1)(vii) Argument 8, Claims 40-42 and 44-45 were erroneously rejected under 35 USC § 102(b) – Anticipation:

The Examiner has rejected claims 40-42 and 44-45 under 35 USC § 102(b) as being anticipated by McCombs 1,254,714. Appellant respectfully traverses the examiner's rejection. Appellant acknowledges the definition of "colorant" as provided by the examiner from the American Heritage

dictionary. However, as appellant noted in appellant's previous office action response, appellant previously amended the claim 40 to delete the limitation of "a discrete unit of liquid dye concentrate". Thus, inasmuch as McCombs' container of paint does not teach a colorant tablet, a discrete article of colorant or a colorant pill defining a colorant powder concentrate enclosed within a liquid soluble container, McCombs does not teach appellant's colorant, and thus does not teach all of the elements of claim 40 and therefore does not anticipate claim 40. Appellant further respectfully suggests that in addition to claim 40, all of the claims depending from claim 40, which inherently include all of the limitations of claim 40, define over and are not anticipated by McCombs. Accordingly, appellant respectfully requests that the rejection be withdrawn. Further appellant directs the board's attention to appellant's previous arguments (in this appeal brief) with respect to appellant's flow channel's and appellant's container portions.

(c)(1)(vii) Argument 9, Claim 43 was erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claim 43 under 35 USC § 103(a) as being unpatentable over McCombs '714 in view of Schramm '046. Inasmuch as claim 43 depends from independent claim 40 which appellant believes to be novel and nonobvious, and inasmuch as claim 43 inherently includes all the limitations of independent claim 40 from which claim 43 depends, appellant respectfully requests that the rejection be withdrawn. Further appellant directs the board's attention to appellant's previous arguments (in this appeal brief) with respect to appellant's container being constructed of (i.e. not a method claim) formed sheet (see also claims 8 and 28 of US patent 6,386,138).

(c)(1)(vii) Argument 10, Claims 40 and 43-45 were erroneously rejected under 35 USC § 102(e) – Anticipation:

The Examiner has rejected claims 40 and 43-45 under 35 USC § 102(e) as being anticipated by Martindale 5,758,797 and argues that Martindale '797 teaches every element of the claimed kit as set forth in claim 40 including a colorant defining a discrete/distinct article. The examiner argues that the predetermined quantity of colorant powder arranged in the container of Martindale defines "a discrete article of colorant". Appellant respectfully traverses the examiner's rejection. Appellant points out

that Webster's dictionary defines the word "article" as, "An individual thing or element of a class; a particular object or item". For further reference, Webster's dictionary further defines the words "thing" as "An individual object", "Object" as "A material thing" and "A thing that forms an element", and "Item" as "A single article or unit in a collection". Thus the powder of Martindale, which comprises a plurality of colorant powder members or small items/grains/ does not teach or anticipate appellant's singular discrete "article". Accordingly, appellant respectfully requests that the rejection be withdrawn.

Appellant further respectfully suggests that in addition to claim 40, all of the claims depending from claim 40, which inherently include all of the limitations of claim 40, define over and are not anticipated by Martindale. Further appellant directs the board's attention to appellant's previous arguments (in this appeal brief) with respect to appellant's flow channel's and with respect to appellant's container being constructed of (i.e. not a method claim) formed sheet (see also claims 8 and 28 of US patent 6,386,138).

(c)(1)(vii) Argument 11, Claim 42 was erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claim 42 under 35 USC § 103(a) as being unpatentable over Martindale '797. Inasmuch as claim 42 depends from independent claim 40 which appellant believes to be novel and nonobvious, and inasmuch as claim 42 inherently includes all the limitations of independent claim 40 from which claim 42 depends, appellant respectfully requests that the rejection be withdrawn.

(c)(1)(vii) Argument 12, Claim 41 was erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claim 41 under 35 USC § 103(a) as being unpatentable over Martindale '797 in view of Lintvedt '294. Inasmuch as claim 41 depends from independent claim 40 which appellant believes to be novel and nonobvious, and inasmuch as claim 41 inherently includes all the limitations of independent claim 40 from which claim 41 depends, appellant respectfully requests that the rejection be withdrawn.

(c)(1)(vii) Argument 13, Claims 52-54 were erroneously rejected under 35 USC § 103(a) – Obviousness:

The Examiner has rejected claims 52-54 under 35 USC § 103(a) as being unpatentable over Price '678 in view of Meth '599. Appellant represents that claims 52-54 include at least one unique and nonobvious limitation that defines appellant's utensil and appellant's colorable work piece (in the case of claim 52) or appellant's article (in the case of claims 53 and 54) to define discrete unconnected items. Appellant notes that this limitation is similar to a limitation found in claim 49 and is addressed in appellant's comments in argument #1 of this appeal brief under the heading "**Unconnected objects**". Inasmuch as appellant's amended claims are believed to be novel and nonobvious and to define over Price '678 and Meth '599 whether alone or in combination, appellant respectfully request's that the examiner's rejection be withdrawn.

(c)(1)(viii) Claims appendix

The following are the claims involved with this appeal.

21. A kit comprising the combination of a container, at least one work piece, at least one utensil, and a colorant, wherein said container includes an inner cavity, an exterior, an opening in a wall of said container and a funnel connected to said opening to provide communication between said inner cavity and the exterior of said container, and wherein said work piece, said utensil, and said colorant are at least partially removably contained within said container.
22. The kit of claim 21 wherein said work piece defines at least one colorable work piece of the following group of colorable work pieces consisting of a substantially egg shaped work piece, an edible work piece, a substantially egg shaped edible work piece, and an egg, and wherein said utensil defines at least one non-edible utensil of the following group of non-edible utensils consisting of a brush, a spoon, a device having a handle portion and a non-handle portion, a wire egg dipper, a pair of tongs, a straw, and a device for use in dipping eggs having a handle portion and an open loop portion, and wherein said colorant defines at least one colorant of the following group of colorants consisting of a colorant tablet, a predetermined quantity of powdered colorant, a discrete unit of colorant concentrate, and a colorant pill defining a colorant powder concentrate enclosed within a liquid soluble container.
23. The kit of claim 22 wherein said container defines a transparent container.
24. The kit of claim 22 wherein said container defines a container comprising a first member and a second member and wherein said first member is sealingly and detachably engageable to said second member.
25. The kit of claim 22 wherein said container defines a container consisting of formed plastic sheet.
26. The kit of claim 22 wherein said container includes at least one liquid flow channel formed in a wall of said container.

27. The kit of claim 22 wherein said container resists the spillage of non-gaseous fluid contents of said container when said container is oriented in any orientation.
28. A kit comprising the combination of a container and at least one work piece substantially removably contained within said container wherein said container includes an inner cavity, an exterior, an opening in a wall of said container and a funnel connected to said opening to provide communication between said inner cavity and the exterior of said container, and wherein said work piece defines at least one colorable non-utensil work piece of the following group of colorable non-utensil work pieces consisting of a substantially egg shaped work piece, an edible work piece, a substantially egg shaped edible work piece, and an egg.
29. The kit of claim 28 wherein said container defines a transparent container.
30. The kit of claim 28 wherein said container defines a container comprising a first member and a second member and wherein said first member is sealingly and detachably engageable to said second member.
31. The kit of claim 28 wherein said container defines a container consisting of formed plastic sheet.
32. The kit of claim 28 wherein said container includes at least one liquid flow channel formed in a wall of said container.
33. The kit of claim 28 wherein said container resists the spillage of non-gaseous fluid contents of said container when said container is oriented in any orientation.
34. A kit comprising the combination of a container, non-fluid edible matter removably contained within said container, and at least one utensil at least partially removably contained within said container wherein said container includes an inner cavity, an exterior, an opening in a wall of said container and a funnel connected to said opening to provide communication between said inner cavity and the exterior of said container, and

wherein said utensil defines at least one non-edible utensil of the following group of non-edible utensils consisting of, a brush, a spoon, a device having a handle portion and a non-handle portion, a pair of tongs, a straw, a wire egg dipper, a device for use in dipping eggs having a handle portion and an egg retention portion, and a device having a handle portion and an open loop portion.

35. The kit of claim 34 wherein said container defines a transparent container.
36. The kit of claim 34 wherein said container defines a container comprising a first member and a second member and wherein said first member is sealingly and detachably engageable to said second member.
37. The kit of claim 34 wherein said container defines a container consisting of formed plastic sheet.
38. The kit of claim 34 wherein said container includes at least one liquid flow channel formed in a wall of said container.
39. The kit of claim 34 wherein said container resists the spillage of non-gaseous fluid contents of said container when said container is oriented in any orientation.
40. A kit comprising the combination of a container and colorant contained within said container wherein said container includes an inner cavity, an exterior, an opening in a wall of said container and a funnel connected to said opening to provide communication between said inner cavity and the exterior of said container, and wherein said colorant defines at least one colorant of the following group of colorants consisting of a colorant tablet, a discrete article of colorant, and a colorant pill defining a colorant powder concentrate enclosed within a liquid soluble container.
41. The kit of claim 40 wherein said container removably contains at least one article of the following group of articles comprising a substantially egg shaped article, an edible article, a substantially egg shaped edible article, an egg, a brush, a spoon, a wire egg

dipper, a pair of tongs, a straw, a utensil having a handle portion and a non-handle portion, and a utensil having a handle portion and an open loop portion.

42. The kit of claim 40 wherein said container defines a container comprising a first member and a second member and wherein said first member is scalingly and detachably engageable to said second member.
43. The kit of claim 40 wherein said container defines a container consisting of formed plastic sheet.
44. The kit of claim 40 wherein said container includes at least one liquid flow channel formed in a wall of said container.
45. The kit of claim 40 wherein said container resists the spillage of non-gaseous fluid contents of said container when said container is oriented in any orientation.
47. A kit comprising the combination of a container, edible matter, and a utensil, wherein said container includes an inner cavity, an exterior, an opening in a wall of said container, and a non-annular funnel connected to said opening to provide communication between said inner cavity and the exterior of said container, and wherein said utensil and said edible matter are at least partially removably contained within said container.
48. The kit of claim 47 wherein a funnel axis is defined as running substantially from the center of said opening in said wall to substantially the center of an opening in said funnel located within said container, and wherein a cross-sectional shape of said funnel in a position substantially normal to said funnel axis defines a cross-sectional shape having a first breadth dimension and a second breadth dimension and wherein said first breadth dimension is greater than said second breadth dimension, and wherein said utensil defines at least one non-edible utensil of the following group of non-edible utensils consisting of a brush, a spoon, a wire egg dipper, a pair of tongs, a straw, a device having a handle portion and a non-handle portion, and a device for use in dipping eggs having a handle portion and an open loop portion.

49. A kit comprising a container having an inner cavity and an opening in a wall of said container, said opening having a funnel connected to said opening to provide communication between said inner cavity and an exterior of said container, and an edible article and a non-edible utensil removably contained within said container, wherein said edible article and said non-edible utensil define two discreet unconnected objects such that said non-edible utensil is operable to manipulate said edible article.
50. A kit comprising a container having an inner cavity and an opening in a wall of said container, said opening having a funnel connected to said opening to provide communication between said inner cavity and an exterior of said container, at least one utensil at least partially removably contained within said container, said utensil having a substantially elongated handle portion and an open loop portion, and non-liquid edible matter removably contained within said container.
51. The kit of claim 50 wherein said utensil defines a device for use in dipping eggs constructed of formed wire and wherein said non-liquid edible matter defines an egg.
52. An apparatus comprising a container having an inner cavity, a utensil, and at least one colorable work piece, said container having an opening in a wall of said container and a funnel connected to said opening to provide communication between said inner cavity and an exterior of said container, and wherein said opening is adapted to permit a work piece to pass through said opening, and wherein said inner cavity includes a well formed in said cavity, said well being adapted to receive said work piece, and wherein said at least one colorable work piece is removably contained within said container, and wherein said utensil is removably positioned within said opening of said container for accessing contents of said container through said opening.
53. A container comprising an inner cavity and an opening in a wall of said container, said opening having a funnel connected to said opening to provide communication between said inner cavity and an exterior of said container, and wherein said container removably contains at least one article of the following group of articles consisting of a substantially egg shaped article, an edible article and a substantially egg shaped edible article, and wherein said opening is adapted to permit said at least one article to pass

through said opening, and wherein said inner cavity includes a well formed in said cavity, said well being adapted to receive said at least one article.

54. A container comprising an inner cavity, an exterior, an opening in a wall of said container to provide communication between said inner cavity and the exterior of said container and a funnel connected to said opening, wherein said container resists the spillage of liquid contents of said container when said container is oriented in any orientation, and wherein said container removably contains at least one article of the following group of articles consisting of a substantially egg shaped article, an edible article and a substantially egg shaped edible article, and wherein said opening is adapted to permit said at least one article to pass through said opening, and wherein said inner cavity includes a well formed in said cavity, said well being adapted to receive said at least one article.

(c)(1)(ix) Evidence appendix

Appellant has no evidence to present.

(c)(1)(x) Related proceedings appendix

Appellant is unaware of any proceedings to present.

Conclusion

In view of the comments above, it is submitted that the Examiner erred in rejecting the claims on appeal. The appellant therefore respectfully requests that this Honorable Board reverse the Examiner's rejection of the claims. If the Board has any questions or comments which may be resolved over the telephone, the board is requested to call Michael R. Schramm at 801-710-7793.

DATE: October 13, 2007

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael R. Schramm".

Michael R. Schramm

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